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No. 83-1414

In the Supreme Court of the United States

OCTOBER TERM, 1983

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, PETITIONER

v.

LAURENCE G. RUSSELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner seeks review of a decision of the court of appeals requiring the National Mediation Board to progress an application for a representation election that was filed by respondent Laurence G. Russell. Petitioner contends that the Board's decision not to progress Russell's application is not subject to judicial review.

1. Under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, a majority of any craft or class of employees of railroads, airlines, and other covered transportation carriers has the right to choose a collective bargaining representative. 45 U.S.C. 152 Fourth. The Board has the duty to investigate any dispute that arises as to the identity of the representative, including supervision of an election, and to determine

and certify the true representative of the employees in any given bargaining unit. 45 U.S.C. 152 Ninth.

In 1943, the police officers and special agents below the rank of captain who worked for respondent Atchison, Topeka, and Santa Fe Railroad elected to be represented by a union (Pet. App. 1a-2a). Petitioner is the current successor in interest of that original union (*id.* at 2a). In 1980, however, certain Santa Fe police officers decided that they no longer wished to have union representation (*ibid.*). Accordingly, the officers gathered 113 authorization cards in the 210-member unit designating respondent Russell as their desired representative under the Act (*id.* at 2a-3a). Russell had promised the employees that, if selected, he intended to abrogate all contracts or agreements between the employees and the Railroad (*id.* at 2a). Russell relied on these cards to support his "Application for Investigation of Representational Dispute" before the Board, in which he claimed that a dispute existed between himself and petitioner over which was the representative of the employees (*id.* at 3a).

The Board dismissed Russell's application, thereby declining to hold a representation election (Pet. App. 41a-47a). It reasoned that "[t]he Railway Labor Act, unlike the National Labor Relations Act, contains no statutory provision for decertification of a bargaining representative. The Board will not progress an application for investigation of a representation dispute where the applicant lacks the intent to represent the craft or class, if certified, and will dismiss such an application because it is void *ab initio*" (*id.* at 46a (citations omitted)). Applying this standard to Russell's application, the Board concluded (*id.* at 47a (emphasis in original)) that

> Laurence G. Russell lacks an intent to represent the subject craft or class if elected and certified, as evidenced by his announced and undisputed plan to

abrogate all existing collective bargaining agreements, thereby leaving the employees unrepresented *in effect*, notwithstanding the certification and the obligations which attach thereto.

2. Russell filed suit in the United States District Court for the Northern District of Texas, seeking an order requiring the Board to progress his application. The district court dismissed the suit for want of jurisdiction, reasoning that the Board's decision was within the scope of its statutory authority and did not violate Russell's constitutional rights (Pet. App. 30a, 33a).

On appeal, the Board and petitioner contended that the district court had correctly dismissed Russell's action. Judicial review of Board decisions is permitted only in narrow circumstances, where constitutional rights are violated or where the decision of the Board is plainly outside its delegated powers and contrary to specific prohibitions of the Act. *Brotherhood of Railway Clerks* v. *Association for the Benefit of Noncontract Employees*, 380 U.S. 650, 659-660 (1965); *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958); *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943). The Board and petitioner argued that the Board's decision not to progress Russell's application did not fall within these narrow limits and was therefore not subject to judicial review.

The court of appeals reversed (Pet. App. 1a-28a). The court of appeals acknowledged that the courts have narrow jurisdiction to review the Board's actions (*id.* at 8a-15a), but it determined that here the Board had violated its clear statutory mandate to investigate representation disputes (*id.* at 15a, 26a-28a).[1] The court rejected the Board's

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[1]Because of this holding, the court of appeals did not reach the alternative claim that the Board's action violated the employees' rights of free association.

argument that "intent to represent" under the Act means "the intent to represent in contract negotiations, contract disputes, grievance procedures, and in all other matters where a labor-management go-between might be effective" (*id.* at 16a). To the contrary, the court reasoned, "[t]here are no qualifiers attached to the Act's simple definition of 'representative.' The 'representative' of a craft of employees is, simply, a person or union designated to act on their behalf, to accomplish what they seek to accomplish, and is not necessarily a man for all seasons" (*id.* at 17a). The court held that employees are entitled under the Act *not* to be represented by a collective bargaining agent, if they so choose (*id.* at 18a-25a). Because the court considered the Board's position to be inconsistent with this proposition, it ordered the Board to proceed with an investigation of Russell's application, presumably by holding a representation election (*id.* at 28a).

3. We do not believe that this case warrants this Court's review. The decision below is, as the court of appeals remarked (Pet. App. 1a), "one of first impression," and accordingly it does not conflict with any decision of this Court or any other court of appeals. The court below enunciated, and arguably observed, the correct legal standard for determining when an action by the Board is subject to judicial review. See *Zantop International Airlines, Inc.* v. *National Mediation Board*, No. 82-1657 (6th Cir. Apr. 19, 1984), slip op. 11-12. Thus, the only real question raised by the petition is whether the Board's view of the duties of a representative clearly violated the Act.

Resolution of that question here is made difficult by problems of interpretation of the Board's opinion. The court of appeals apparently interpreted the opinion as denying employees the right to reject collective bargaining (Pet. App. 20a). The basis of the Board's opinion, however, was not that employees have no right to reject collective

bargaining, but that Russell's application did not properly raise the issue. The Board has maintained that it would be premature to decide whether and in what manner a union can be decertified until that issue is directly and properly presented to it. Cf. *Zantop International Airlines, supra.* The court of appeals disagreed and found it necessary to reach the issue. It remains to be seen whether its holding, which appears to be confined to these unusual procedural circumstances, will be of much practical importance.

Moreover, in compliance with the decision below, the Board has already begun its investigation into the merits of Russell's application. In the absence of a stay order, which petitioner has not sought in this Court, this controversy might well become moot before the Court has had an opportunity to resolve it.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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